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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX JR., M.D.,

Plaintiff,

vs.

ALTA BATES SUMMIT MEDICAL  
CENTER,

Defendants.

Case No. C 07-2486 WHA

**PLAINTIFF'S MOTION IN LIMINE  
NO. 5 TO EXCLUDE TESTIMONY  
OF JAMES LOVIN AND BRIAN  
HITE, M.D.; DECLARATION OF  
RACHEL SATER**

**Trial Date: June 2, 2008**  
**Dept: Ctrm. 9, 19<sup>th</sup> Floor**  
**Judge: Hon. William H. Alsup**

Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude specified testimony of James Lovin and Brian Hite, M.D. ABSMC designated Mr. Lovin and Dr. Hite to testify regarding information they provided in the challenged peer review process, and Dr. Ennix does not object to such testimony. Rather, Dr. Ennix moves to exclude any testimony other than the opinions or evidence that Lovin or Hite provided to ABSMC during the peer review, as such additional testimony would not have been considered by ABSMC and therefore would have no probative value regarding ABSMC's motivation or the veracity of its proffered justification of

1 protecting “patient safety.” If such testimony has any probative value, it is outweighed by the  
2 potential for prejudice, confusion, and waste of time.

3 Therefore, the Court should exclude all testimony of Dr. Hite and Mr. Lovin other than  
4 the testimony that each furnished during the peer review at issue.

#### 5 STATEMENT OF FACTS

6 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of  
7 42 U.S.C. § 1981 in a peer review process conducted at the Summit campus. In its initial  
8 disclosures, ABSMC stated that it would call Mr. Lovin (a surgical technician) and Dr. Hite as  
9 witness, asserting that each has “knowledge he has provided to the peer review process,  
10 including during his interview” with the AHC and the MEC, respectively. (See Sater Decl., ¶ 2,  
11 Exhibit A, at 7:21-28.)

#### 12 ARGUMENT

13 The sole issue in this case is whether race was a factor in ABSMC’s peer review actions  
14 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. This Court should exclude  
15 testimony by Lovin and Hite, other than testifying as to their testimony before the AMC and  
16 MEC, respectively. Evidence is admissible if it is probative as to a “fact of consequence” and its  
17 probative value is not “outweighed by the danger of unfair prejudice, confusion of the issues, or  
18 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation  
19 of cumulative evidence.” FRE Rules 401, 403. Opinions or evidence not considered by  
20 ABSMC have no probative value regarding whether ABSMC’s actions regarding the current  
21 peer review were justified by patient care concerns or were motivated by racial animus. On that  
22 basis, Dr. Hite’s and Mr. Lovin’s testimony should be excluded except regarding their testimony  
23 to ABSMC during the peer review.

24 Finally, even if Lovin’s and Hite’s testimony, not delivered to ABSMC, had any  
25 probative value in this case, such minimal value would be outweighed by its potential for unfair  
26 prejudice and confusion of the jury, which might mistakenly believe ABSMC had considered  
27 such testimony in the course of its peer review, when in fact it did not. Further, presentation of  
28

1 this extraneous evidence would unnecessarily waste time and delay conclusion of this case. For  
2 these additional reasons, this Court should exclude such evidence.

3 CONCLUSION

4 For the foregoing reasons, Dr. Ennix respectfully requests that the Court exclude the  
5 testimony of Dr. Hite and Mr. Lovin other than regarding their testimony to the MEC and AHC,  
6 respectively, during the challenged peer review.

7 Respectfully submitted,

8 Dated: April 29, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

11  
12 By: /s/  
Rachel J. Sater

13 Attorneys for Plaintiff

14  
15 DECLARATION OF RACHEL J. SATER

16 I, Rachel J. Sater, declare:

17 1. I am an attorney licensed to practice law in the State of California and in this  
18 Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the  
19 Plaintiff.

20 2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of  
21 ABSMC's initial disclosures in this case.

22 I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct to the best of my knowledge.

24  
25  
26 Dated: April 29, 2008

/s/  
Rachel J. Sater

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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14

15 COYNESS L. ENNIX, JR., M.D.,  
16 Plaintiff,

17 v.  
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20 ALTA BATES SUMMIT MEDICAL CENTER,  
21 Defendant.

CASE NO. C 07-2486 WHA

**DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION IN LIMINE  
NO. 5 TO EXCLUDE TESTIMONY  
OF JAMES LOVIN AND BRIAN  
HITE, M.D.**

**DATE:** May 19, 2008  
**TIME:** 2:00 p.m.  
**DEPT:** Ctrm. 9, 19th Floor  
**JUDGE:** Hon. William H. Alsup

**COMPLAINT FILED:** May 9, 2007  
**TRIAL DATE:** June 2, 2008

1     **I. INTRODUCTION**

2             Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital"),  
3     hereby submits this opposition to Plaintiff Coyness L. Ennix's ("Plaintiff's") Motion in  
4     Limine No. 5 to Exclude Testimony of James Lovin and Brian Hite, M.D.

5             Plaintiff concedes that Mr. Lovin and Dr. Hite are relevant witnesses to this  
6     action and does not challenge any testimony or evidence they intend to provide  
7     concerning the information furnished to ABSMC by them in the peer review process.  
8     Plaintiff, however, seeks to exclude any other testimony offered by them, which would  
9     not have been considered by ABSMC because it allegedly would have "no probative  
10    value as to ABSMC's motivation or veracity of its proffered justification of protecting  
11    'patient safety.'" Plaintiff's narrow reasoning is flawed as Mr. Lovin and Dr. Hite's  
12    anticipated testimony is relevant to other factual issues put forth by Plaintiff as well as  
13    ABSMC's defense in this case. Therefore, such testimony must be admissible at trial.

14    **II. ANTICIPATED TESTIMONY**

15            ABSMC has identified the scope of the anticipated testimony of Mr. Lovin  
16    and Dr. Hite in its Witness List. It does not appear that Plaintiff has any objection to the  
17    testimony of Mr. Lovin and Dr. Hite as to their participation in the peer review process  
18    concerning Plaintiff, which includes their discussions with the Ad Hoc Committee and/or  
19    Medical Staff Officers. Rather, Plaintiff challenges any other testimony they may offer.  
20    This would presumably include Mr. Lovin and Dr. Hite's knowledge and observations on  
21    which their discussions with ABSMC were based, Dr. Hite's knowledge of Plaintiff's  
22    reputation for patient care; and Mr. Lovin's continuing concern regarding Plaintiff's skill  
23    and attentiveness as reported to ABSMC.

24    **III. ARGUMENT**

25            The Federal Rules of Evidence provide that relevant evidence is  
26    admissible at trial. Pursuant to Rule 401 states that relevant evidence is defined as "  
27    evidence having any tendency to make the existence of any fact that is of consequence  
28

1 to the determination of the action more probable or less probable than it would be  
2 without the evidence. See also *U.S. v. Boulware*, 384 F. 3d 794, 805 (9th Cir. 2004).

3 **A. The Anticipated Testimony of Mr. Lovin and Dr. Hite Is Relevant.**

4 Plaintiff concedes that Mr. Lovin and Dr. Hite provided information  
5 including opinions or evidence to ABSMC during Plaintiff's peer review. Plaintiff's motion  
6 in limine, however, is based on the faulty premise that only the actual opinions or  
7 evidence offered during the peer review is relevant in this action.

8 Plaintiff seeks to remove from the jury's consideration information that is  
9 relevant to the central issues of this case. Inherent in the opinions offered by Mr. Lovin  
10 and Dr. Hite to ABSMC is their personal interactions and observations of Plaintiff, which  
11 is proper witness testimony under Rule 701.<sup>1</sup> Such testimony will further assist with  
12 providing a "clear understanding of testimony." Both Mr. Lovin and Dr. Hite will  
13 demonstrate how and why they were in a position to contribute information to ABSMC  
14 during the peer review process.<sup>2</sup> Plaintiff cannot establish how such testimony is beyond  
15 the scope of permissible testimony.

16 The anticipated testimony Dr. Hite is also relevant to another factual issue  
17 presented by this case, Plaintiff's reputation for patient care. Such testimony is relevant  
18 as Plaintiff has put his reputation squarely at issue in this case.<sup>3</sup> Thus, Plaintiff cannot  
19

20 <sup>1</sup> Opinion Testimony By Lay Witnesses. If the witness is not testifying as an expert, the  
21 witness' testimony in the form of opinions or inferences is limited to those opinions or  
22 inferences which are (a) rationally based on the perception of the witness, and (b)  
23 helpful to a clear understanding of the witness' testimony or the determination of a fact in  
24 issue, and (c) not based on scientific, technical, or other specialized knowledge within  
25 the scope of Rule 702. Fed. R. Evid. 701.

26 <sup>2</sup> For example, Dr. Hite intends to testify as to his personal knowledge of Plaintiff's  
27 practice as well as the preparations made by him and other OR team members made  
28 before commencing minimally invasive valve procedures. Testimony directly relevant to  
the opinions and evidence he provided to ABSMC.

<sup>3</sup> In the Complaint, Plaintiff surmises that "[t]his case arises out of the concerted effort of  
medical doctors ... and Alta Bates Summit Medical Center ("Alta Bates Summit") to  
destroy the career of Plaintiff Coyness L. Ennix Jr., M.D. ("Plaintiff or "Dr. Ennix"), a  
highly experienced and accomplished African American cardiac surgeon." (Compl.,  
1:25-2:1.) From the inception of this action and to date, Plaintiff attributes the acts by  
ABSM have resulted in the "devastating damage" to his reputation (2:14-15, 3:4-6, see  
also Plaintiff's Deposition, 10:14-15:21; Plaintiff's Expert Report of Jed Greene, CPA,  
CMA, pp. 7-8, ¶¶ 27-28.)

1 deny the introduction of such relevant evidence. *Lloyd v. Conseco Finance Corp.*, 2001  
 2 WL 36097624 \*7 (C.D. Cal. Oct. 19, 2001) (defendants' expert opinion as to average  
 3 length of time individuals in plaintiff's position employed with defendant relevant to rebut  
 4 damages); *Gotthardt v. National Railroad Passenger Corp.*, 191 F. 3d 1148, 1158 (9th  
 5 Cir.1999) (plaintiff unable to show that her lost work could be attributed to defendant's  
 6 unlawful conduct).

7 The information relevant to the jury's determination of whether ABSMC  
 8 was motivated by racial discrimination goes beyond the narrow scope urged by Plaintiff.  
 9 It includes all information available to the decision makers regarding Plaintiff, including  
 10 the personal knowledge and observations which founded the opinions offered by Mr.  
 11 Lovin and Dr. Hite. Such information is relevant to the jury's evaluation of ABSMC's  
 12 intent.

13 **B. The Anticipated Testimony of Mr. Lovin and Dr. Hite is Not More**  
 14 **Prejudicial Than Probative.**

15 Plaintiff asserts that the testimony of Mr. Lovin and Dr. Hite should be  
 16 excluded because its probative value is substantially outweighed by the potential  
 17 prejudicial impact on the jury. This assertion is unsupported by the facts and should be  
 18 rejected by this Court. Rule 403 provides:

19 Although relevant, evidence may be excluded if its probative  
 20 value is substantially outweighed by the danger of unfair  
 21 prejudice, confusion of the issues, or misleading the jury, or  
 22 by considerations of undue delay, waste of time, or needless  
 23 presentation of cumulative evidence.

24 Fed. R. Evid. 403. District courts are accorded great latitude in determining whether the  
 25 prejudicial effect of evidence outweighs its probative value. *Trevino v. Gates* (9th Cir.  
 26 1996) 99 F.3d 911, 922.

27 Plaintiff's sole argument in support the contention that the probative value  
 28 of the testimony of Mr. Lovin and Dr. Hite is substantially outweighed by prejudice, is that  
 the jury might "mistakenly believe ABSMC had considered such testimony in the course  
 of its peer review, which in fact it did not." Plaintiff's expressed concern is without merit.



1 Both Mr. Lovin and Dr. Hite provided information that was considered by ABSMC in the  
2 peer review process. Any potential prejudice does not outweigh the relevance of their  
3 testimony. Instructions can be provided to the jury to remedy Plaintiff's concerns rather  
4 than the preclusion of the testimony, which will assist the jury in its evaluation of whether  
5 the Hospital acted based on racial animus.

6 **IV. CONCLUSION**

7 For each of the foregoing reasons, Defendant ABSMC respectfully  
8 requests that the Court deny Plaintiff's Motion in Limine No. 5, which seeks to prevent  
9 the introduction to exclude the testimony of Mr. Lovin and Dr. Hite in its entirety. The  
10 anticipated testimony of Mr. Lovin and Dr. Hite should be admitted.

11 DATED: May 9, 2008

KAUFF MCCLAIN & MCGUIRE LLP

12 By: 

ALEX HERNAEZ

13  
14 Attorneys for Defendant  
15 ALTA BATES SUMMIT MEDICAL  
16 CENTER  
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